McLaren Macomb *and* Local 40, Office and Professional Employees International Union (OPEIU), AFL–CIO. Case 07–CA–232056

May 11, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On September 30, 2019, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, McLaren Macomb, Mount Clemens, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Replace paragraph 1(a) with the following.

(a) Refusing to bargain collectively with Local 40, Office and Professional Employees International Union (OPEIU), AFL–CIO by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

2. Replace paragraph 2(a) with the following.

(a) Post at its facility in Mount Clemens, Michigan, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 19, 2018.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unreasonably delaying the provision of relevant requested information. We note that the timely provision of requested information relevant for processing contractual grievances is central to the collective-bargaining relationship and to the parties' fulfillment of their statutory duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437–438 (1967); *Teachers College, Columbia University*, 902 F.3d 296, 304 (D.C. Cir. 2018), enfg. 365 NLRB No. 86 (2017); *Woodland Clinic*, 331 NLRB 735, 736–737 (2000). As the Board has previously observed, an extensive body of law governs the duty to provide relevant requested information, and there surely are times when parties must exercise their legal right to have the Board resolve information request disputes in accord with these principles of law. However, as the Board has also previously observed, in many circumstances parties are more likely to obtain a satisfactory and timely resolution of these disputes through good-faith discussions between themselves rather than involving the Board through unfair labor practice litigation. *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 367 NLRB No. 117, slip op. at 1 fn. 2 (2019).

Chairman Ring and Member Kaplan note that they would, in a future appropriate case, consider whether evidence "that the relevance of the information should have been apparent to the Respondent under the circumstances" is sufficient to give rise to an employer's obligation to provide information. *Disneyland Park,* 350 NLRB 1256, 1258 (2007).

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), and we shall substitute a new notice to conform to the Order as modified.

[3] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 11, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Local 40, Office and Professional Employees International Union (OPEIU), AFL–CIO by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

McLAREN MACOMB

The Board's decision can be found at https://www.nlrb.gov/case/07-CA-232056 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Eric S. Cockrell, Esq., for the General Counsel.
Rhonda H. Armstrong, Esq., for the Respondent.
Scott A. Brooks, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, ADMINISTRATIVE LAW JUDGE. This case was tried in Detroit, Michigan, on July 8, 2019. Local 40, Office and Professional Employees International Union (OPEIU), the Charging Party (the Union), filed its charge on December 3, 2018[1] against Respondent, McLaren Macomb. The General Counsel issued the complaint on March 20, 2019. The complaint alleges that from September 19, 2018, until January 10, 2019, Respondent unreasonably delayed in furnishing the Union with certain requested information in violation of Section 8(a)(5) and (1) of the Act.

The parties were afforded the opportunity to make opening statements; call, examine, and cross-examine witnesses; present any relevant documentary evidence; and file posthearing briefs.

Accordingly, on the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has been operating a hospital providing inpatient and outpatient care in its facility and place of business in Mount Clemens, Michigan (also known as McLaren Macomb Medical Center). During the calendar year ending December 31, 2018, Respondent, in conducting its operations described above, derived gross revenue in excess of $250,000. During the same period, Respondent also purchased and received at its Mount Clemens facility goods valued in excess of $5000 directly from points located outside the State of Michigan. Respondent does not deny, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of

[1] All dates are in 2018 unless otherwise indicated.

the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that from September 19, 2018, until January 10, 2019, Respondent unreasonably delayed in furnishing the Union with the following requested information: 1) dobutamine, persantine, and thallium stress tests conducted since May 1, and 2) the number of times that a registered nurse (RN) had been needed to perform/monitor those stress tests since May 1.

At all material times, the following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regularly scheduled part-time Registered Nurses, contingent RNs employed at McLaren Medical Center - Macomb, but excluding Clinical Managers, Assistant Clinical Managers, Nursing Supervisors, Coordinators and Directors of Patient Care areas, Clinical Educators and all other employees.

(Jt. Exh. 2.)[3] Since February 28, 2010, Respondent has recognized the Union as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective agreements, the most recent of which is effective from July 29, 2018, through July 27, 2021. (Id.) The most recent agreement was ratified on September 4 and signed "sometime thereafter." (Tr. 138.) At all times since February 28, 2010, the Union has been the exclusive collective-bargaining representative of the Unit.[4]

Factual Background

Respondent's change in its business plan

Laura Gibbard (Gibbard) is vice president of human resources and Loraine Cusumano (Cusumano) is the regional director of cardiovascular services for Respondent's medical facility.[5] Respondent employs about 2300 employees at this facility.

The Union consists of approximately 620–630 bargaining unit employees at McLaren Macomb Medical Center. At all relevant times, its president has been Jeff Morawski (Morawski) and its vice president has been Dina Carlisle (Carlisle). On about May 3, 2018, Respondent, through Lisa Renaud, human resources director, and Cusumano informed the Union of Respondent's plan to eliminate four registered nurse (RN) positions in the noninvasive cardiovascular services unit (also referred to as the noninvasive cardiology unit), effective on about June 3, 2018. They explained that these nurses would be replaced by nonbargaining unit RNs and exercise physiologists (EPs). (Tr. 47–54.) Part of the Unit RN duties in the noninvasive cardiovascular services unit involved the nurses performing noninvasive but intravenous chemical cardio stress tests. This involved administering intravenous chemicals and medications in performing the stress tests (such as dobutamine, persantine, and thallium), notifying physicians of test results and reviewing labs and prior history of the patients. (Tr. 55–57.) It is undisputed that nonbargaining unit employees have been performing these duties since June 3.

In response, on May 9, Carlisle filed a grievance on behalf of the Union to have the RNs returned to their position and duties in the noninvasive cardiology unit and be made whole. (Tr. 59, 62.) Morawski and Carlisle explained that the Union had determined that one of the affected full-time RNs, Pam Ventimiglia, would be losing wages and paid time off (PTO) benefits and therefore sought to make that employee whole and return all the nurses by way of the arbitration process to their positions in cardiovascular services. (Tr. 62–65, 110–111.) The grievance (#18–49) alleged that Respondent had notified the Union that "non invasive cardiology nurses at McLaren Macomb will be changing to the business model from RNs to EPs. No notification of this change was provided in writing to Local 40."[6] (GC Exh. 2.) The Union also asserted that by doing so, Respondent had violated several CBA articles (e.g. Arts. 5 [Sec. 1, 2, and 3], 2, 9, and 18). Respondent denied the grievance at Steps 2 and 3, and on June 20, Carlisle notified that the Union was advancing the grievance to arbitration. (GC Exhs. 2–3; R. Exh. 1.) Morawski testified that they provided the grievance to the Union's attorney, Scott Brooks, to submit for arbitration. At the time of trial, the pending arbitration had not been scheduled.[7] (Tr. 84–85.)

Union's request for information

On September 19, 2018, Carlisle on behalf of the Union, sent an email to Gibbard requesting that Respondent provide "dobutamine, persantine and thallium stress tests [that] have been done since May 1, 2018" and "how many times [that] an RN [has] been needed to perform/monitor the stress tests since May 1, 2018." (Jt. Exh. 3, pp. 2–3.) On December 3, after not receiving any response from Respondent, Brooks filed a charge on behalf of the Union with the NLRB, alleging that Respondent had violated the Act by refusing to provide information requested by the Union and relating to the noninvasive cardiology unit. (Tr. 92–93; GC Exh. 1(a).)

On about January 3 or 4, Shela Khan Monroe (Monroe), vice president labor and employment relations, left a voice message for the Union with Morawski. On or about January 8, she left a similar message for Carlisle. In both, she was requesting to

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[2] At trial, Respondent amended its answer to admit its commerce status and the Union's organization status as set forth in complaint para. 4 and 5.

[3] Full-time registered nurses work 72 to 80 hours and part-time registered nurses work 20 to 72 hours in a two-week period. Contingent registered nurses work less than 20 hours in a 28-day period. (Tr. 40–41.)

[4] Respondent also amended its answer, on the record, to admit the Unit description as it is set forth in complaint para. 7.

[5] Respondent admits, and I find, that both Gibbard and Cusumano have been supervisors and agents of Respondent for all material times within the meaning of Sec. 2(11) and 2(13) of the Act. Cusumano, who has since retired did not testify.

[6] Morawski testified that the Union also filed the grievance because the EPs were unlicensed. (Tr. 62.)

[7] Morawski and Carlisle provided uncontroverted testimony that the arbitration was still pending. Carlisle advanced the grievance to arbitration within the required 30 days from receipt of the written response subsequent to Step 3 in accord with both CBAs, Art. 7, Sec. 2 (E). (Jt. Exhs. 1–2.) On November 1, 2018, the Union also filed an ULP charge regarding the displacement of the RNs. The Region dismissed this charge in January 2019 due (generally) to insufficient evidence to establish a violation of the Act.

discuss the unfair labor practice charge (Tr. 75–76, 105, 139). Carlisle testified that Monroe "just was asking to have a discussion about whether we could settle the ULP that was outstanding regarding noninvasive cardiology." Neither Morawski nor Carlisle returned Monroe's call. They testified that they did not do so because they wanted to confer with the Union's attorney, Brooks. They did not get back to Monroe before Respondent furnished the requested information. (Tr. 74–75, 105–106.)

Respondent furnished the Union with this information on January 10, 2019. In Gibbard's email with the requested information, she apologized and responded that:

> As you know, I regularly handle/respond to information requests and, like many others, I asked the department to assemble information that you requested and planned to forward it on to you when I received it. While I'm not entirely sure, it appears that while the department assembled the information, it did not make it to me and I, did not realize this request went unanswered. As you know, if I have objections or am unable to determine what information you are seeking in a particular information request, I typically email you immediately with my objections or questions. Otherwise, it is my goal to provide responsive information. In the future, obviously I'll try to ensure this does not happen again. But, if it does, I encourage you to reach out to me directly and I'll check on the status and promptly provide it, as appropriate.
>
> With that said, the department assembled responsive information back in September. I'm forwarding [the] information. Shela also relayed that she called you (and Jeff) earlier this week to discuss this request, but has not heard back from you. I would like to emphasize that it appears this information is irrelevant given bargaining unit employees do not perform stress tests and contract negotiations are over. And, I'm unaware of how it is otherwise relevant or necessary to your representational duties. Without waiving these objections, I am providing the below information. Please let me know if you want me to have the department assemble additional information from September, to date. If I don't hear from you, I'll assume this is what you were looking for.
>
> From May 1st through September 24th- dobutamine (17), persantine (262), and thallium stress test (139).
>
> During the May 1st through June 2nd- RN where [sic] still present in the department they completed (4) dobutmaines [sic], (68) persantines, and (33) thallium stress test[s]. In addition, RN call in on 5/19 (Saturday Morning), RN's all called to see if any of them could come in to work. No call back from 2 of 3 RN's. Rebecca (RN) our manager pushed medications while John our supervisor observed/finalized stress test[s] for physicians.
>
> Since June 3rd; no RN's needed to perform/monitor any stress test; we have done (13) dobutanines, (194) persantine, and (106) thallium stress test[s].

(Jt. Exh. 3.) Both Morawski and Carlisle agreed that this fulfilled their information request of September 19. (Tr. 72.) There is no dispute that the January 10 email was the first time that Respondent expressed the belief that the Union's information request was not relevant or necessary to the Union's representational duties. In fact, other than the phone messages that Monroe left before January 10, this was the only communication of any kind from Respondent since the September 19 request.

Morawski and Carlisle testified that information was necessary for, and relevant to, its performance of its duties as the exclusive collective-bargaining representative for the Unit, and that Respondent unreasonably delayed in providing it. More specifically, Morawski explained that shortly before sending the request, the Union learned that some of the tests previously performed by bargaining unit RNs were being performed by a nonbargaining unit RN clinical manager, Rebecca Avers, instead of the EPs. He and Carlisle admitted that they requested this information to determine whether Respondent had assigned a nonbargaining unit RN to perform the work of the displaced bargaining unit RNs, contrary to what Respondent had previously communicated.[8] Morawski also testified that they needed this information for arbitration. Carlisle concurred with these justifications for the Union's request. She added that the Union required the requested information because "[w]e had hoped for the safety of our patients in the noninvasive cardiology unit to get the nurses back into their jobs…[w]e felt that this was important knowledge to know, especially the information we had received on or about September 19th that if other RNs were indeed…if RNs were doing that work that were not bargaining unit RNs." (Tr. 68–70, 103–104, 110–113.) Both insisted that the Union at no time consented to a delay or waived its right to receive the information. (Tr.76–79, 108.)

Respondent's reasons for the delay

Gibbard testified that the Union's request contained no indication of its relevance, and that the Union had not filed another grievance or advanced the initial grievance to arbitration. She claimed to have had no idea whatsoever as to the reasons for the request. Nevertheless, she decided to fulfill the request. Gibbard also pointed out how Respondent had previously responded in a timely manner to many of the Union's multiple, lengthy, almost weekly requests for information.

Gibbard admitted that she is the person who regularly responds to union information requests as a part of her job duties. (Tr. 120.) She also admitted that there was a delay in responding to the Union's September 2019 request, but attributed the delay to an oversight on Respondent's part. She testified when she received the Union's information request at 3:56 p.m. on September 19, she promptly forwarded it to Cusumano (director of cardiology) at 4:20 p.m. and directed her to pull the information. Cusumano responded to Gibbard on the same day. After some back and forth on September 19 and 20, about the nature of the information requested and the RNs who may have may have performed the tests, Cusumano emailed Gibbard that "we'll start on that today." (R. Exh. 2, p. 1.) During the same period,

[8] Respondent had previously advised that the RNs would be replaced by the EPs.

Cusumano conferred with John Silveri, supervisor of the noninvasive cardiology unit, to confirm that he and Rebecca Avers were the only RNs who had assisted in training of the EPs who started administering the stress tests on June 3. Silveri confirmed this information, and on September 24, provided Cusumano with the information ultimately furnished to the Union. (R. Exh. 3, pp. 1–2.)

Gibbard testified that she was surprised when they received the Union's NLRB charge because in the past, the Union would remind them when they had not received a response to an information request. (Tr. 120–122.) She thought at the time that they had furnished the Union with the requested information; however, she discovered through a review of her emails that they had not. Then, she contacted Silveri to gather the information to send to the Union in January 2019. (R. Exh. 2, pp. 1–2.) Gibbard insisted that the delay was not intentional; she claimed that Respondent has 2000 employees and that she is a "busy" person. (Tr. 124.) She also testified that it was mid-December, around the holidays and she had taken a two-week vacation. This is when she discovered that Cusumano had not forwarded the information to her. Gibbard speculated that, "I think she just forgot. She was getting ready to retire. She retired in January, and so I think she was just winding down in her position, and I think ultimately it just got missed." (Id.)

Next, Respondent introduced through Gibbard emails within the six months or so of the trial showing how Respondent had timely responded to numerous information request from the Union. She explained that they "usually responded within a day or two," and within a short period of time even when the responses included thousands of pages of documents. She also asserted that the Union sent numerous information requests on an almost weekly basis. (Tr. 128–132; R. Exhs. 4–6.) She further testified that the information request was not remotely relevant or necessary because the issue regarding the transfer of work from the RNs to the EPs had gone to arbitration, negotiations on the new contract had closed and effects bargaining had ceased. The Union had also missed the time frame for filing another grievance. (Tr. 132.)

Monroe testified as to how the information requested was not relevant because it elicited information about nonbargaining unit employees. She also testified that during collective bargaining negotiations which resulted in a ratified CBA on September 4, 2018 and during an unrelated arbitration meeting on November 29, 2018, to address all outstanding issues, the Union representatives never mentioned the need for information or the outstanding request. (Tr. 136–139.) In other words, Gibbard and Monroe blamed the Union representatives for not raising the matter of or otherwise reminding them about the outstanding request prior to filing the NLRB charge. She described how she reached out to both Marawski and Carlisle after learning that Respondent had not provided the requested information, but that neither of them returned her call, "nor did they follow up in any way, shape, or form." (Tr. 139.)

Morawski testified that the Union representatives did not raise the outstanding information request with Respondent's representatives on those occasions because all parties were focused on other matters. He and Carlisle also testified that they had previously been instructed to send all information requests to Gibbard. (Tr. 142–143, 145.) As previously noted, Gibbard testified that she was Respondent's contact person for receiving all information requests from the Union. Further, a review of the numerous information requests and responses between the Union and Respondent appear to show that all such requests and discussions concerning them appeared to have been between Carlisle or chief steward, Terry Dagg-Barr and Gibbard. (R. Exhs. 4–5.) Although Monroe implied that during contract negotiations, they tried to resolve all outstanding issues, there is no evidence that Respondent specifically asked about the pending information requests or the pending grievance/arbitration.

A further review of the multiple information requests and responses produced by Respondent show that Respondent, through Gibbard, often, responded to the Union's numerous information requests within a few days or weeks or within 30 days. There was one instance where the Union emailed a second request after about a month and seven days from the initial request, to which Gibbard responded by forwarding the documents (over 5000 pages) within about eleven days. (R. Exhs. 4, pp. 23–24; 5, p. 5.) However, there was another instance when Gibbard did not fulfill another of the Union's information requests because it "[was] not bargaining unit information and is thus not presumptively relevant…[t]he employer will provide all relevant, nonprivileged, non-confidential information," and that that particular request "[did] not comply with this requirement." Gibbard emailed this particular response on the same day as the Union's request. In the instant case, Gibbard did not notify the Union, at any time before January 10, 2019, that the information request was not presumptively relevant.[9]

Collective-bargaining agreement

The parties submitted portions of the parties' collective-bargaining agreements (CBAs) in effect from the time of its notifying the Union of its decision affecting the Unit RNs (Jt. Exh. 1) and the time of the request at issue (Jt. Exh. 2). In its grievance regarding the elimination of RNs, the Union alleged that Respondent had violated certain articles and provisions of the CBA including Article 2 (involving recognition), Article 5, Sections 1–3 (involving roles of the RN), Article 9 (pertaining to definitions and length of service), and Article 18 (pertaining to wages and benefits). There is no dispute that these CBA provisions were not materially different. (Tr. 99; Jt. Exhs. 1–2.)

Analysis

The Union's information request was relevant

Pursuant to Sections 8(a)(5) and 8(d) of the Act, an employer must provide a requesting union information necessary for the performance of its duties. While information concerning terms and conditions of employment of employees represented by a

[9] On the other hand, the General Counsel argued in his opening statement and brief that Respondent had on numerous occasions violated the Act by failing to provide or delaying in providing the Union with requested information. However, since the General Counsel did so by citing various Board cases, I will address this argument in the analysis section of this decision

union is generally presumed relevant to the union in its role as a bargaining representative, information pertaining to nonunit matters or employees may also be necessary for a union to fulfill its representational duties. This applies to information necessary "not only for collective bargaining but for grievance adjustment and contract administration." *Centura Health St. Mary-Corwin Medical Center*, 360 NLRB 689, 692 (2014), citing *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *Wisconsin Bell, Inc.*, 346 NLRB 62, 64 (2005). Information regarding an employer's nonunit employees may also be relevant when an employer places nonunit terms and conditions at issue. For example, in *Harmon Auto Glass*, 352 NLRB 152, 152 (2008), reaffd. 355 NLRB 364, 364 fn.3 (2010), the Board found that a union was entitled to learn the dollar amount contributed by the employer's nonunion employees towards their health care insurance, after the employer proposed that unit employees contribute an equal amount. Thus, an employer may not refuse to furnish extra-unit requested information solely on the basis that it concerns matters outside the scope of the bargaining unit represented by the union. *NLRB v. Acme Industrial*, 385 U.S. at 436; *Curtiss-Wright Corp., Wright Aeronautical Division v. NLRB*, 347 F.2d 61 (3d Cir. 1965), enfg. 145 NLRB 152 (1963).

Generally, where an information request seeks nonunit information, the relevance of the request is not presumed but must be shown. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). This means that the General Counsel must present evidence that either: (a) the union demonstrated relevance of the nonunit information, or (2) the relevance of the information should have been apparent to the respondent under the circumstances. Id. (footnote omitted); see also, *Teachers College, Columbia University v. NLRB*, 902 F.3d 296 (D.C. Cir. 2018), enfg. 365 NLRB No. 86 (2017). The burden to establish relevance in information requests, including those involving nonunit employees, is not a heavy one, and potential or probable relevance will sufficiently invoke an employer's obligation to provide information. The Board uses a broad, discovery-type standard, requiring only that the union demonstrate "more than a mere suspicion of the matter for which the information is sought." *Racetrack Food Services, Inc.*, 353 NLRB 687, 699 (2008) (citation omitted), reaffd. 355 NLRB 1258, 1258 (2010); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Reiss Viking*, supra; *Children's Hospital of San Francisco*, 312 NLRB 920, 930 (1993). The requesting party satisfies this burden by demonstrating its reasonable belief for requesting the information, supported by objective evidence. *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

That said, the requesting party certainly is not required to rely on proof to *establish* the violation. Instead, it must merely show a "reasonable belief that enough facts existed to give rise to a reasonable belief" in the violation. *Walter N. Yoder & Sons, Inc.*, 754 F.2d 531, 536 (4th Cir. 1985), enfg. 270 NLRB 652 (1984); see also *New York Times Co.*, 270 NLRB at 1275 ("to require an initial, burdensome showing by the union before it can gain access to information which is necessary to determine if a violation has occurred defeats the very purpose of the 'liberal discovery standard' of relevance which is to be used"). Nor must the requesting party be shown to have been correct in its belief. Indeed, "[t]he Board does not pass on the merits of the union's claim that the employer breached the collective-bargaining agreement or committed an unfair labor practice, and the information that triggered the union's request may be based on hearsay and need not be accurate or ultimately reliable." *E.I. Du Pont De Nemours & Co.*, 366 NLRB No. 178, slip op. at 5 (2018). See also *Acme Industrial*, 385 U.S. at 437–438; *Racetrack Food Services, Inc.*, 353 NLRB at 699–700 (even when its claim ultimately failed, the union was entitled to names and addresses of nonunit employees in support thereof). Finally, the Board has determined that where arbitration is invoked, "it will be facilitated 'by permitting a union access to a broad scope of potentially useful information.'" *E.I. Du Pont De Nemours & Co.*, 366 NLRB No. 178, slip op. at 4, citing *Shoppers Food Warehouse*, 315 NLRB at 259–260.

Here, the information sought by the Union resulted in a response that included information about nonunit nurses. In fact, Carlisle and Morawski admitted that they requested the information because they learned that nonunit nurses or a nurse manager had been performing the stress test work that the Unit nurses had been performing prior to June 3. Therefore, arguably the information requested would not be presumptively relevant. However, I find that even if not presumptively relevant, the General Counsel has met the responsibility of showing that the information requested involved and affected the terms and conditions of its member RNs' employment and related to a pending arbitration such that it was relevant. The Union has demonstrated here "more than a mere suspicion of the matter for which the information is sought." The Union filed a grievance and advanced the same to arbitration concerning the elimination of the RNs from their positions and duties in the cardiovascular services unit. Respondent advised the Union that nonbargaining unit exercise physiologists would be resuming certain duties previously performed by the RNs. Respondent argues that the subject of the grievance was limited to whether it had given requisite notice before eliminating RN positions from the noninvasive cardiology department. However, the grievance also includes the claim regarding the actual change from RNs to EPs. In the "Statement of Remedy" section, the Union demanded that Respondent cease and desist from violating the CBA and remedy those affected unit RNs by returning them to their duties and positions and compensating them for any lost pay, benefits, and overtime. In addition, Respondent's own grievance report included the Union's claim that it had violated certain CBA provisions when it made changes in the department. (GC Exhs. 2–3.) It is not necessary that the Union's claims be true given the Union reasonably believed, based on objective evidence, that Respondent had breached the CBA. Nor can I judge the merits of such claims. *E.I. Du Pont De Nemours & Co.*, 366 NLRB No. 178, slip op. at 5.

Further, the Union representatives later discovered that a nonbargaining unit RN had also been performing the RN work (cardiac stress tests) after being told that RNs would no longer be doing so. This new information, true or not, prompted the Union to make its information request. I find this resulted in the Union's reasonable belief and suspicion that Respondent had continued to violate the CBA. It appears from email communications in September 2018, Silveri, manager of noninvasive

cardiology, wrote that "EP's started performing stress test[sic] on 6/3/2018," and that he "or Rebecca [Avers, clinical nurse manager] have been the only two assisting in the training of the EP's." In addition, Cusumano confirmed on September 19 that "Rebecca and John were here only for the back-up for training/compentency of the EP's." (R. Exhs. 2–3.) Therefore, these communications tend to support the Union's contention and belief that at least one nurse manager had been administering stress tests post June 3. It matters not that he or she may have only been training or providing back up for the EPs, a fact that Respondent did not share with the Union. The Board has previously affirmed an administrative law judge's finding that a respondent violated Section 8(a)(5) of the Act by refusing to furnish the union relevant and necessary information where the union had a reasonable ground to fear that unit work was being performed by nonbarganing unit employees. *Mt. Clemens Gen. Hospital*, 344 NLRB 450, 463 (2005).[10]

I reject Respondent's misinterpretation of the Supreme Court's quotation in *Detroit Edison*, that the Court "did not require the union to show more than a 'bare assertion' that it needed the information." (R. Br. at 15.) Rather, the Court found that "a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested…[t]he duty to supply information under Section 8(a)(5) turns upon 'the circumstances of the particular case.'" *Detroit Edison*, 440 U.S. 301, 314 (1979), citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956).

Contrary to Respondent's contention, the General Counsel has not only demonstrated relevancy, but shown that the relevance of the requested information should have been apparent to Respondent under the circumstances. It is unbelievable that Gibbard had no idea why the Union requested the information. Indeed, it is evident from the communications between Cusumano and Gibbard and others after receiving the Union's information request that they knew or should have known that it concerned the transition of performance of the stress tests from the RNs to nonbargaining unit EPs. It also should have been apparent that the Union sought to see who else other than the Unit RNs had been administering stress tests in the noninvasive cardiology unit.

Therefore, in this case, I find that the circumstances support the relevance of the requested information and Respondent's obligation to furnish it to the Union.

Respondent violated the Act by its delay in providing information to the Union

The Board has long held that an employer must respond to an information request in a timely manner. See *Woodland Clinic*, 331 NLRB 735, 736 (2000). Thus, "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). In determining whether an employer has unlawfully delayed in furnishing information, the Board considers the totality of the circumstances. "What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014) citing *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enfd. in pertinent part 394 F.3d 233 (4th Cir. 2005). The Board has also found that this analysis is an objective one; it does not turn on "whether the employer delayed in bad faith…but on whether it supplied the requested information in a reasonable time." *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018).

There is no doubt here that the Union's information request was neither complex nor unavailable. In considering the totality of the circumstances, I find that Respondent unreasonably delayed in providing information which was readily available. It was Gibbard's responsibility to receive all information requests and to make sure that they were fulfilled. She claims that this request inadvertently fell through the cracks even though Respondent's management officials had compiled the information in September. However, after the Union filed an NLRB charge in early December, Respondent still delayed in furnishing the Union with the information. Moreover, when Respondent continued in delaying in providing the Union with the information for over a month after receiving the Union's charge, Gibbard never attempted to contact any of the Union representatives by email or otherwise to provide the already collected information or explain the reason for the delay. In fact, an email communication from Silveri on January 8, appears to reflect that he forwarded "[i]nformation request for non invasive cardiology" to Avers only two days prior to the date the information was sent to the Union. (R. Exh. 3, p. 1.) It is true that Monroe left telephone messages for Carlisle and Morawski in early January about the Union's December 3 ULP charge. However, there is no evidence that Respondent informed the Union of the alleged inadvertent delay until it provided the information on January 10.

Gibbard provided several speculative explanations for the delay, including that she was busy, that Cusumano must have overlooked sending her the information in September because of her upcoming retirement at the end of the year, and finally because she was on vacation during the holidays.[11] However, the Board has found that a respondent violated the Act even where Respondent's official had inadvertently "forgotten to provide the information when she received it from the Respondent, and then supplied it" 3.5 months later. *Management & Training Corp.*, 366 NLRB No. 134, slip op at 2, 4. The Board has affirmed an administrative judge finding that, "[t]o the extent that Respondent delayed in providing such information, regardless of whether such failure was inadvertent or the result of error, such delay has been in violation of its obligations under the Act." *Lenox Hill Hosp.*, 362 NLRB 106, 112–115 (2015).

[10] This case is referenced only for the Board's finding that information about nonunit employees was relevant. There was no evidence that Respondent McLaren in this case owned or was associated with Mt. Clemens General Hospital at the time of the violations.

[11] Gibbard's two-week vacation in mid-December does not explain or excuse Respondent's delay in providing the information between September 19 and December.

Based on the forgoing, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it delayed in furnishing the Union with the requested information.

Respondent's remaining defenses are without merit

I have already determined that the Union's requests were not only relevant but also that Respondent's delay violated the Act. In doing so, I have rejected Respondent's argument that it should be absolved of liability because it has routinely responded to the Union's numerous and often lengthy information requests in a timely manner. Although it may have bearing on the type of remedial action taken, it does not relieve Respondent of its obligation given the circumstances in this case.

In its answer to the complaint, Respondent asserted that somehow the Union had waived its right to receive the information. Absent a union's clear and unmistakable waiver of such a statutory right, a respondent violates the Act if it refuses to provide information. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Respondent failed to show that the Union in any way clearly and unmistakably waived its right to the information requested here. Respondent has pointed to the fact that the Union did not remind Respondent that it had not provided the information. However, this assertion is belied by the facts. Specifically, after Respondent received notice that the Union had filed a NLRB charge regarding its failure to respond to the information request, Respondent continued to delay in furnishing the information. I also reject Respondent's contention that the Union's failure to remind Respondent about the outstanding information request during unrelated meetings with management representatives constitutes a waiver.

Respondent's defenses as presented appear to have shifted away from a claim that its delay was inadvertent and to one that the Union was never entitled to information. Respondent further avers that it had no duty to tell the Union that it believed that its requests were not relevant. I disagree in this case where Respondent apparently showed no internal concerns about relevancy in the September email communications or prior to January 10. Nevertheless, Respondent has not rebutted the General Counsel's showing of relevancy.

Respondent further insists that it had no derivative duty to provide the requested information, based on the Region's dismissal of the underlying charge. Respondent's reliance on *FirstEnergy Generation, LLC*, 366 NLRB No. 87 (2018), remanded in *FirstEnergy Generation, LLC v. NLRB*, 929 F.3d 321, 334 (6th Cir. 2019) is misplaced. The Court of Appeals reversed the Board's decision and found that the transfer of work historically performed by unit employees (to nonunit employees) was not a mandatory subject of bargaining and therefore the employer had no duty to provide information concerning the transfer. Here, there is no evidence that the Board found that the transfer was not a mandatory subject of bargaining. Moreover, I have found that the information in this case is still relevant to the Union's representational duties regarding the pending arbitration. See *Racetrack Food Services, Inc.*, 353 NLRB at 699–700 (even when its claim ultimately failed, the union was entitled to names and addresses of nonunit employees in support thereof); *E.I. Du Pont De Nemours & Co.*, 366 NLRB No. 178, slip op. at 4, citing *Shoppers Food Warehouse*, 315 NLRB at 259–260 (where arbitration is invoked, a union will be permitted access to a broad scope of potentially useful information).

Respondent's reliance on *Steven Creek Chrysler Jeep Dodge, Inc*., 353 NLRB 1294, 1295 (2009) is also misplaced as it did not involve a Section 8(a)(5) violation and the Board remanded the case to the judge to reevaluate the inappropriateness of a *Gissel* bargaining order. In fact, the quotation that Respondent lifts from *Steven Creek Chrysler Jeep Dodge, Inc.*, is made by the judge to whom the case was remanded and did not constitute any determination by the Board. 353 NLRB at 1305.

Respondent also pointed out that the General Counsel (and this administrative law judge) suggested that surrounding circumstances were irrelevant. However, as demonstrated, I have considered the totality of the circumstances presented in this case. Respondent's other defenses, even those not specifically addressed here, have been considered and are similarly without merit.

Accordingly, I find that Respondent violated the Act as alleged by unreasonably delaying in furnishing the requested information.

CONCLUSIONS OF LAW

1. By unreasonably delaying in providing the Union with relevant requested information, Respondent has violated Section 8(a)(5) and (1) of the Act.

2. The foregoing unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall order that Respondent cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, Respondent is ordered to cease and desist from unlawfully delaying in providing relevant requested information to the Union that is necessary in the Union's performance of its duties and responsibilities as the exclusive collective-bargaining representative of the Unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

Respondent McLaren Macomb, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Delaying in furnishing information requested by Local 40, Office of Professional Employees International Union (OPEIU) (the Union) that is relevant and necessary in the Union's performance of its duties and responsibilities as the collective-bargaining representative of its employees.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Mount Clemens, Michigan copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 19, 2018.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 30, 2019

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."